Supreme Court, U.S.
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No. 96-2010

In The

Supreme Court of the United States

October Term, 1996

JAMES LARRY RHYMER,

Petitioner,

vs.

YOKOHAMA TIRE CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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25 pp

QUESTION PRESENTED FOR REVIEW

Can a plaintiff survive summary judgment in an age discrimination case where the plaintiff supports his claim that the employer's nondiscriminatory reason for the plaintiff's discharge is false or unworthy of credence with evidence that the plaintiff's supervisors, who were not participants in the decision-making process, did not agree with the sole decision maker's conclusion that the plaintiff's inadequate job performance was grounds for termination, and the plaintiff has proffered no evidence that the decision maker was motivated by the plaintiff's age.

LIST OF PARTIES TO PROCEEDING

Petitioner: James Larry Rhymer

Respondent: Yokohama Tire Corporation

Parents and Nonwholly Owned Subsidiaries of Respondent: Yokohama Corporation of North America (parent corporation)

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Rhymer v. Yokohama Tire Corporation, Case No. 96-1191, Opinion (unpublished) (4th Cir. Jan. 16, 1997)

SUMMARY OF ARGUMENT

James Larry Rhymer's ("Rhymer") Petition should be denied, for two reasons. First, this Court's decision of the issue presented by Rhymer is unnecessary because it is based upon a faulty premise which is not supported by the record evidence or by the decision below. Accordingly, a decision as to this issue is not outcome determinative and would amount to nothing more than an advisory opinion by this Court. Essentially, Rhymer frames the issue as follows: whether summary judgment can ever be granted in an age discrimination case where the plaintiff has established a *prima facie* case and has raised a genuine issue of material fact as to whether the employer's nondiscriminatory reason for the plaintiff's discharge is false or unworthy of credence. This purported issue, however, is not presented by this case because Rhymer failed to present any evidence that the Respondent Yokohama Tire Corporation's ("Yokohama") nondiscriminatory reason for his discharge was false or unworthy of credence, since he failed to show that the decision maker (Y. Hanabusa, Yokohama's President and CEO) ("Hanabusa") was motivated by any reason other than that which was

articulated (poor analytical skills resulting in deficient job performance) — *i.e.*, that Hanabusa did not honestly believe in this asserted reason. The fact that Rhymer's supervisors (who were themselves critical of Rhymer's analytical ability) did not agree with Hanabusa that Rhymer's deficiencies warranted termination does nothing to disprove that Hanabusa was motivated by Rhymer's job performance in terminating his employment.

Second, the Fourth Circuit Court of Appeals applied the appropriate rule of law in this case and there is no conflict between it and the other circuit courts of appeal. Contrary to Rhymer's contention, the Fourth Circuit does not necessarily require a plaintiff to present additional evidence of age-based animus in order to overcome the employer's stated reason for the discharge and survive summary judgment. The court only required Rhymer to come forward with such evidence here because Rhymer presented no evidence disproving Hanabusa's nondiscriminatory explanation — *i.e.*, evidence showing that explanation to be false or unworthy of credence.

Accordingly, Rhymer has presented no viable question for review by this Court, and his Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

A. Statement of Proceedings

Rhymer instituted suit against Yokohama in the United States District Court for the Western District of Virginia. Rhymer alleged that his employment with Yokohama was terminated in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (the "ADEA").

1. District Court Proceedings

On July 20, 1995, Yokohama filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56. The bases for Yokohama's motion in connection with Rhymer's ADEA claim were multiple, including: (1) Rhymer could not establish a *prima facie* case of age discrimination because he was not performing his job at a level which met Yokohama's legitimate job expectations;[1] and (2) even if Rhymer could establish a *prima facie* case of age discrimination, there was an absolute failure of proof by Rhymer that the nondiscriminatory reason of the decision maker (Hanabusa) for Rhymer's discharge (inadequate analytical skills resulting in poor job performance) was a pretext for age discrimination.

The district court granted Yokohama's motion for summary judgment. *Rhymer v. Yokohama Tire Corporation*, Case No. 93-0198-R, Memorandum Opinion (W.D. Va. Nov. 1, 1995), slip op. at 8-11 (JA at 23-26).[2] First, it determined that Rhymer presented no evidence of Yokohama's intent to discriminate against him because of his age. *Id.*, slip op. at 8-9 (JA at 23-24). Second, applying the burden-shifting proof scheme enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the district court concluded not only that Rhymer had not established a *prima facie* case of age discrimination, but also

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1. Yokohama also argued that Rhymer was replaced by a person within the protected class and therefore could not establish the fourth element of a *prima facie* case. The district court agreed. Subsequently, this Court issued its decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1310 (1996), and the Fourth Circuit, following *O'Connor*, found sufficient evidence of the fourth *prima facie* element in that Rhymer's replacement may have been "substantially younger" than he.

2. The abbreviation "JA" is meant to refer to the Joint Appendix which was filed with the court of appeals below.

that there was insufficient evidence that Hanabusa's legitimate, nondiscriminatory reason for terminating Rhymer's employment was a pretext for age discrimination. *Id.*, slip op. at 9-11 (JA at 24-26).

In his effort to obtain the attention and review of this Court, Rhymer has misstated the district court's findings pertaining to the *McDonnell Douglas* proof scheme. The court did not, as Rhymer asserts at p. 3 of his Petition, find a genuine issue of fact as to whether Hanabusa's reason for the discharge was false and thus pretextual. To the contrary, the district court expressly found Hanabusa's reason not to be pretextual. *Id.*, slip op. at 11 (JA at 26). Rather, in connection with its initial analysis of the sufficiency of Rhymer's proof of a *prima facie* case, the district court simply found there to exist a triable factual issue as to the third *prima facie* element — whether Rhymer performed his job at a level which met Yokohama's legitimate job expectations.

2. Court of Appeals Proceedings

Before the Fourth Circuit, Rhymer proceeded solely under the *McDonnell Douglas* proof scheme. Rhymer argued that he had presented sufficient evidence to create a triable issue as to whether Hanabusa's reason for terminating his employment (inadequate analytical skills resulting in poor job performance) was false or unworthy of credence, and therefore a pretext for age discrimination. In support of this contention, Rhymer argued that his immediate supervisors (Richard Switzer and Matthew Anderson) — who had no part in Hanabusa's decision and, indeed, who had questioned Rhymer's analytical skills themselves — disagreed with Hanabusa's decision that Rhymer's inadequate performance warranted termination. Rhymer also argued that the fact that he received a bonus in 1991 somehow constituted proof that Hanabusa's reason for termination was

pretextual, although the record contains no evidence that Hanabusa had anything whatsoever to do with Rhymer's bonus.

The court of appeals affirmed the district court's grant of summary judgment in favor of Yokohama, holding that Rhymer failed to create a triable issue of fact that Hanabusa's reason for terminating his employment was a pretext for age discrimination. In reaching that conclusion, the court of appeals applied the following standard:

> "[I]f the plaintiff offers nothing to disprove the defendant's nondiscriminatory explanation[ ], the explanation['s] weakness alone is insufficient to create an issue of pretext." [Citation omitted.] The plaintiff bears the ultimate burden of presenting "affirmative evidence of age-based animus." [Citation omitted.]

Rhymer v. Yokohama Tire Corp., Case No. 96-1191, unpublished, slip op. at 8 (4th Cir. Jan. 16, 1997) (quoting *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728, 732 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997)).

Rhymer's case rests upon the theory that his supervisors' disagreement with Hanabusa's decision served to disprove Hanabusa's reason for it and thus created a factual issue as to pretext. In rejecting this theory, the court of appeals held as follows:

> Rhymer argues that his immediate supervisors, Switzer and Anderson, did not agree with Hanabusa's decision to fire him. He reasons, therefore, that his job performance must have been satisfactory and

> the real reason for his termination must have been his age. . . . Although Switzer and Anderson, who were themselves critical of Rhymer's job performance, did not think that Rhymer's inadequacies rose to a level warranting termination, that does not support an inference that Hanabusa (the company president) fired Rhymer because of age discrimination.

Id., slip op. at 6-7.[3] Because Rhymer was unable to establish facts to show that Hanabusa's reason for the discharge was pretextual or a lie, it was incumbent upon Rhymer to produce other affirmative evidence of age-based animus under the Fourth Circuit's standard. The court of appeals concluded that he had not done so.[4] *Id.*, slip op. at 7.

B. Statement of the Facts

Rhymer was hired by Mohawk Rubber Company ("Mohawk") in 1964 and became Mohawk's Plant Controller in 1969 at its Helena, Arkansas facility. (JA at 69, 70.) After transferring to Mohawk's Salem, Virginia plant in 1976 and

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3. The court of appeals commented on the plaintiff's failure to depose Hanabusa, but emphasized that there *was* evidence in the record that Hanabusa was dissatisfied with Rhymer's job performance. Presumably, Rhymer chose not to depose Hanabusa because he knew that Hanabusa's decision was not motivated by age.

4. Rhymer's purported evidence of age-based animus consisted of statistics regarding Yokohama's management workforce and a double hearsay statement from unidentified individuals which had no nexus to Hanabusa or his decision to discharge Rhymer. The court of appeals correctly held that the statistics and the double hearsay statement did not constitute affirmative evidence of age-based animus on the part of Hanabusa. *Id.*, slip op. at 7. Rhymer has not disputed that conclusion in his Petition.

serving there as Plant Manager for several years, Rhymer became the Salem facility's Plant Controller in 1988. (JA at 71.) In 1989, Mohawk was purchased by Yokohama, and the Salem facility was thereafter under new management and overseen by Hanabusa, Yokohama's president and CEO. (JA at 38.) On February 24, 1992, Rhymer's employment was terminated. The decision to terminate Rhymer's employment was made solely by Hanabusa. (JA at 104.)

As Plant Controller, Rhymer was responsible for all of the Salem plant's finances, including preparation and compilation of the annual and capital budgets and monthly production of documents relating to variances. (JA at 41-42.) Rhymer was also charged with analyzing and recommending ways to control the growing usage variance (*i.e.*, shrinkage of inventory) problem at the Salem plant. (JA at 127-128.)

Rhymer's discharge resulted from Hanabusa's dissatisfaction with Rhymer's ability to perform adequately the analytical functions of Plant Controller. Principally, Hanabusa was troubled by Rhymer's difficulty in analyzing and recommending ways to control the usage variance problem. In September of 1991, Hanabusa instructed Rhymer to prepare a written, detailed explanation of the usage variance, including a discussion of potential countermeasures to be taken. (JA at 110-111, 156.) Rhymer was told to report on this issue on a monthly basis in memo format, with the first report due by October 18, 1991. (JA at 109-112, 202-203.) Rhymer failed to submit the first report as requested (JA at 61-62, 111-112), even though he knew that there was an urgency, from Hanabusa's standpoint, to provide the usage variance countermeasures. (JA at 132-133.) In fact, he did not begin to prepare the report until November 12. (JA at 129-130.)

Hanabusa's observations of Rhymer's analytical deficiencies were shared by his supervisors, Richard Switzer

("Switzer") and Matthew Anderson ("Anderson"). (JA at 43, 45-46, 54-55, 65.) For instance, Switzer believed that Rhymer "didn't have the ability to do the analysis that was necessary," and that Rhymer's shortcomings became a "serious situation." (JA at 45-46.)[5] Likewise, Anderson believed Rhymer's "overall" performance to be deficient from an "analytical standpoint." (JA at 65.) Anderson also "didn't feel [Rhymer] had an understanding of the reason or the mechanics of the allocation of costs between brands, the purpose behind it." (JA at 55.) Thus, while Switzer and Anderson may have disagreed with Hanabusa that Rhymer's deficiencies warranted termination, there is no dispute that they questioned Rhymer's analytical ability.

In January of 1992, Rhymer was requested to attend an executive meeting, attended by Hanabusa, and was told in advance to be prepared to address the usage variance problem in the Salem plant. (JA at 139-140, 178.) During this meeting, Hanabusa asked Rhymer questions about the usage variance problem. (JA at 141, 178.) However, Rhymer was unprepared and unable to answer some of Hanabusa's questions regarding the variance analysis, and he proposed no solutions to the problem. (JA at 141-142, 178.) For instance, Rhymer was unable to compare the variance numbers for 1991 with those for 1989 and 1990, and thus was unable to report as to whether there had been an improvement or a loss. (JA at 141-142, 178.)

Given Rhymer's inability to perform the analytical responsibilities of a plant controller, and principally his inability to analyze the usage variance problem and recommend ways to improve it, his employment relationship with Yokohama was terminated on February 24, 1992 by Hanabusa.[6] The decision to

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5. In an affidavit, Rhymer also conceded that Switzer had informed him directly that he (Rhymer) "was not doing some things." (JA at 200.)

6. Rhymer was not, as he claims at p. 7 of his Petition, discharged for failing to *correct* the usage variance problem — for he was never instructed

(Cont'd)

terminate Rhymer's employment was made solely by Hanabusa and no one else. (JA at 104.) Throughout this matter, Rhymer has conceded that neither Switzer nor Anderson had any participation whatsoever in his discharge. (JA at 104; Rhymer Petition, p. 7.) Indeed, while not involved in Hanabusa's decision, Switzer himself had no reason to believe that the decision had anything to do with Rhymer's age. (JA at 107, 52.)

After Rhymer's employment was terminated, the usage variance problem improved. (JA at 49.)[7] Although Rhymer alleges that an accounting firm has indicated that the variance numbers improved by January of 1992, the record contains no admissible evidence in support of this hearsay statement. Further, although Rhymer cites to Anderson's testimony in support of his claim that he returned to the Salem plant to explain his countermeasures to the usage variance problem (Rhymer Petition, p. 8), Anderson's testimony does not support this proposition. Anderson stated that he does not remember whether this occurred (JA at 51-52), and there is no record evidence indicating that it did.

(Cont'd)
to correct it, but rather to understand the issue, analyze it, and make recommendations. Moreover, Rhymer understates the reason for his discharge by narrowly focusing upon the usage variance issue. The problem was much more fundamental — Rhymer did not have the analytical ability to meet the requirements of his job, and his inability to analyze the usage variance problem was an example of his lack of analytical skills.

7. Throughout these proceedings, Rhymer has characterized the status of the usage variance problem after his discharge to suit his purpose. In the district court, in an affidavit, Rhymer contended that this problem "continued after I left the company." (JA at 201) Now, in support of his attempt to have this case reviewed yet again, Rhymer contends that the variance problem improved (allegedly as a result of something he did) after he left Yokohama.

REASONS FOR DENYING THE WRIT

I.

SINCE RHYMER'S SUPERVISORS' DISAGREEMENT WITH HANABUSA'S DECISION TO TERMINATE RHYMER'S EMPLOYMENT DOES NOT CONSTITUTE EVIDENCE THAT HANABUSA'S REASON FOR DISCHARGING RHYMER WAS FALSE OR UNWORTHY OF CREDENCE, THERE IS NO NEED FOR THIS COURT TO ADDRESS THE ISSUE FRAMED BY RHYMER.

Rhymer has requested that this Court determine whether summary judgment is ever appropriate in cases where the plaintiff has established a *prima facie* case and has raised a genuine issue of material fact as to whether the employer's nondiscriminatory reason for discharge is false or unworthy of credence. This particular case, however, does not present the Court with this purported issue because Rhymer did not produce any evidence that Hanabusa's reason for discharging him was false or unworthy of credence.

According to Rhymer, the Fourth Circuit "determined that even though Rhymer had presented evidence that Yokohama's proffered reason was false, summary judgment was nonetheless appropriate because he failed to produce other additional evidence of discrimination." (*Id.*) Rhymer has misstated the Fourth Circuit's opinion. Although the Fourth Circuit found there to be a factual issue as to whether Rhymer performed his job adequately in connection with its analysis of Rhymer's *prima facie* case, the Fourth Circuit did not hold that Rhymer had raised a triable factual issue as to whether Yokohama — *i.e.*, Hanabusa — had lied in stating that Rhymer was discharged for poor job performance. The evidence offered by Rhymer in support of his claim that Hanabusa did not terminate Rhymer's employment

due to his poor job performance essentially consisted of his belief that his supervisors disagreed with Hanabusa's decision. As the court of appeals properly held, while this evidence was relevant to the third element of Rhymer's *prima facie* case, it did not create a genuine issue of material fact as to the veracity of Hanabusa's reason for terminating Rhymer's employment. *Id.*, slip op. at 6-7.

Rhymer's position is fundamentally flawed and demonstrates an inherent misunderstanding of the pretext element of an age discrimination claim. Whether an employee is performing his job adequately is relevant to the third element of a *prima facie* case. At the pretext stage, however, "the employee must show that the employer did not honestly believe in the reasons it gave for firing him." *Wolf v. Buss (America) Inc.*, 77 F.3d 914, 919 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 175 (1996), *reh'g denied*, 117 S. Ct. 546 (1996). *See also McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992); *Elrod v. Sears, Roebuck and Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). Accordingly, the third *prima facie* element and the issue of pretext are two distinct inquiries. *See Williams v. Williams Electronics, Inc.*, 856 F.2d 920, 923-924 (7th Cir. 1988) (holding that the plaintiff had established a *prima facie* case, but that the plaintiff's evidence that he had performed satisfactorily "do[es] not create a basis upon which it can be concluded that [the employer] did not genuinely and honestly weigh performance-based considerations in making its layoff decision"); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1224 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (although there was a dispute about whether the plaintiff's work was satisfactory, there was no dispute that the decision makers did not believe the plaintiff's work to be satisfactory). Put another way, that the decision maker may be mistaken about the facts underlying the discharge does not mean that the reason is pretextual. *See Randle v. City of Aurora*, 69 F.3d 441, 455

(10th Cir. 1995) ("just because the reason relied upon for a certain action is mistaken does not mean that the reason is pretextual"); *Fuentes v. Perskie*, 32 F.3d 759, 765 (3rd Cir. 1994) ("To discredit the employer's proffered reason, . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent"); *Kralman v. Ill. Dept. of Veterans' Affairs*, 23 F.3d 150, 156 (7th Cir. 1994), *cert. denied*, 513 U.S. 948 (1994) ("It is important to keep in mind . . . that there is a fine line between evidence that appropriately challenges the employer's proffered reasons as being unworthy of credence and evidence that merely shows that the employer made a mistake or a bad business judgment").

Thus, in examining the issue of pretext, there is a critical distinction between the beliefs of non-decision makers and the beliefs of the individual who makes the decision to discharge the plaintiff. A difference of opinion over an employee's job performance between coworkers, on the one hand, and the decision maker, on the other hand, does not equate with evidence that the decision maker's beliefs about the plaintiff's job performance are false or unworthy of credence. *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1125 (7th Cir. 1994) ("[t]he mere submission of materials from a co-worker or supervisor indicating that an employee's performance is satisfactory . . . does not create a material issue of fact" on the issue of pretext).[8] *See also Williams*, 856 F.2d at 924

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8. Before the court of appeals, Rhymer attempted to distinguish *Anderson* by arguing that this case involves additional evidence of age discrimination not present in *Anderson*. This evidence consisted of statistical information regarding Yokohama's workforce and a double hearsay statement having no nexus to Hanabusa's termination decision. (*See* note 3, above.) As the court of appeals correctly held, this "evidence" does not support Rhymer's claim that Hanabusa was motivated by Rhymer's age. Thus, the decision in *Anderson* is unquestionably on point as to the dispositive issue presented (Cont'd)

(supervisor's testimony that plaintiff's performance was satisfactory was not enough to create a genuine issue of material fact as to whether the employer honestly considered performance-related factors in determining who would be laid off); *Kephart*, 630 F.2d at 1223 (affidavits of fellow employees stating that the plaintiff's performance was satisfactory were not enough to create a material issue of fact as to whether the decision maker genuinely believed that the plaintiff was not performing satisfactorily).

A different case would be presented where there is evidence that a decision maker actually believed that the employee was performing well (*e.g.*, by rendering a favorable job evaluation), yet discharged the employee for the false reason that he was performing poorly. Since the inconsistency lies with the decision maker, a genuine issue of fact might well exist as to whether the employer's nondiscriminatory reason is false or unworthy of credence. *See Wheeler v. McKinley Enterprises*, 937 F.2d 1158, 1160-1162 (6th Cir. 1991) (decision makers' claim that they discharged the plaintiff for poor job performance found to be pretextual because, *inter alia*, it was inconsistent with the decision makers' post-discharge letters praising the plaintiff's job performance); *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229, 231 (6th Cir. 1990) (decision maker's claim that he discharged the plaintiff for deficient performance and insubordination found to be pretextual because inconsistent with the decision maker's comments at a party that the plaintiff was an "excellent" and "key" employee who did "perfect" work). This is not such a case. Rhymer presented no evidence that Hanabusa ever believed Rhymer to be performing his job well.

(Cont'd)
here: whether the views of co-workers about the plaintiff's job performance can support the plaintiff's claim that the decision maker was not motivated by job performance issues in discharging the plaintiff (and thus that the reason is false or unworthy of credence).

He, therefore, presented no evidence that Hanabusa's reason for discharging him was false or unworthy of credence.

If Rhymer's view were accepted, then all employment discrimination plaintiffs discharged for poor job performance who establish a *prima facie* case would automatically and necessarily demonstrate pretext in the same showing. Employment discrimination defendants would always be liable in such cases upon the plaintiff's establishment of a *prima facie* case. Such a result is contrary to this Court's teachings — for if the fact finder's disbelief of the employer's nondiscriminatory reason does not compel a finding for the plaintiff at the pretext stage (as this Court held in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993)), then surely the mere establishment of a *prima facie* case cannot compel such a finding.

There is no evidence in this case that Hanabusa's reason for terminating Rhymer's employment was false or unworthy of credence. Consequently, the issue framed by Rhymer is not appropriately before this Court and no viable question for this Court to review has been presented.

II.

THE FOURTH CIRCUIT COURT OF APPEALS HAS NOT HELD THAT A PLAINTIFF IS ALWAYS REQUIRED TO PRESENT EVIDENCE OF AGE-BASED ANIMUS IN ADDITION TO EVIDENCE THAT THE EMPLOYER'S NONDISCRIMINATORY REASON IS FALSE OR UNWORTHY OF CREDENCE, IN ORDER TO SURVIVE SUMMARY JUDGMENT, AND ITS VIEW IS CONSISTENT WITH OTHER COURTS OF APPEAL.

Under the *McDonnell Douglas* proof scheme, the defendant's articulation of a nondiscriminatory reason for the plaintiff's discharge rebuts the plaintiff's *prima facie* case and squarely places the ultimate burden on the plaintiff to prove that the defendant was motivated by the plaintiff's protected class (in this case age). *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-508 (1993). In order for the plaintiff to successfully establish this, he must show that the employer's nondiscriminatory reason is a pretext for intentional discrimination. *Id.* This means that the plaintiff must establish both that the employer's nondiscriminatory reason is false, and that discrimination was the real reason. *Hicks*, 509 U.S. at 515. "[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (quoted in *Hicks*).

Because Rhymer did not present evidence to create an issue of fact as to pretext, the Fourth Circuit did not need to apply *Hicks* but, instead, appropriately applied the following rule in this case:

> [I]f the plaintiff offers nothing to disprove the defendant's nondiscriminatory

> explanations, the explanations' weakness alone is insufficient to create an issue of pretext. Instead, the burden of production returns to the plaintiff to present affirmative evidence of age-based animus.

Burns v. AAF-McQuay, Inc., 96 F.3d 728, 732 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1247 (1997) (quoted by the Fourth Circuit in its decision below). Thus, the issue of whether or not there exists a conflict among the circuit courts of appeal as to the application of *Hicks* in the "pretext for discrimination" context is not even properly before the Court. As the Fourth Circuit implicitly recognized (indeed, the Fourth Circuit did not even cite *Hicks* in its decision below), those cases do not control this case. As in *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 443-444 (11th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3861 (June 27, 1997), and as discussed in more detail above, Rhymer failed to create "an issue of fact about the disbelievability of the employers reason for the firing decision." *Isenbergh*, 97 F.3d at 444. Accordingly, the Fourth Circuit did not reach or address this issue or the cases concerning it since it found that Rhymer had failed to create a genuine issue of fact as to pretext.

Moreover, even had the Fourth Circuit reached this issue, Rhymer erroneously reads the *Burns* case to say that at the summary judgment stage, a plaintiff in an age discrimination case is always required to present evidence of age-based animus. The express language of *Burns* does not support Rhymer's view. Under the *Burns* holding quoted above, the plaintiff will be required to come forward with such evidence if he is unable to disprove the employer's nondiscriminatory reason (which Rhymer failed to do here). *Burns*, 96 F.3d at 732. Rhymer's obvious overstatement of the rule of the law also overlooks those cases where evidence of age animus is not necessarily required

— such as where the plaintiff has presented such strong evidence that the decision maker's proffered reason is fundamentally at odds with the record evidence (*see Wheeler* and *Kraus*, *supra*).

It would appear that the *Burns* case and thus the Fourth Circuit does not endorse a strict "pretext plus" standard — where to survive summary judgment a plaintiff must *always* prove animus. It appears that *Burns*, like cases from other circuits, applied a middle ground rule of law. Under this approach, in the context of summary judgment, where a plaintiff has established a *prima facie* case and has established sufficient evidence for a jury to disbelieve the reasons proffered by the employer, the trial court nevertheless may decide that the evidence is insufficient for a reasonable juror to infer age discrimination and therefore, grant summary judgment in favor of the employer. *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1335 (8th Cir. 1996); *Isenbergh*, 97 F.3d at 441; *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996) (*en banc*); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 261-262 n.3 (1st Cir. 1994). In any event, because there is no evidence of pretext in this case and no conflict among the circuits to be resolved, there is no need for this Court to review this matter.

CONCLUSION

A determination of the issue framed by Rhymer would not have any impact upon the merits of this case, and thus any decision of this Court would amount to nothing more than an advisory opinion. Further, the Fourth Circuit Court of Appeals applied the correct legal standard and its decision is not in conflict with the decisions of this Court or those of other circuits. For these reasons, Rhymer's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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